FILE COPY

Office - Supreme Court, U. S.
FILED
MAY 16 1945
CHARLES ELMORE CROPLEY
CLERK

No. 1269. 75 21

In the Supreme Court of the United States

October Term, 1944.

CHAMPLIN REFINING COMPANY, A CORPORATION,
Appellant,
vs.
UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

BRIEF OPPOSING MOTION TO AFFIRM.

HARRY O. GLASSER,
DAN MOODY,
Attorneys for Appellant.

INDEX.

	PAGE
Statement	1
Argument	6
Points of error	6
Statement	7
Argument in support of Points of Error II to VI, inc.	8
The holdings of the majority, that Section 1 of the Interstate Commerce Act applies to all engaged in interstate transportation of oil by pipe line, and that appellant is a "statutory" common carrier	9
The holding of the majority that since appellant is engaged in transporting oil products for the purpose of later marketing them, "it is engaged in transportation in commerce within the meaning of the Act."	18
The holding of the majority that appellant is a "'future' pipe line company."	24
Argument in support of Point of Error VII	28
The holding of the majority that the "differential" is a charge for transportation	28

AUTHORITIES CITED.

Brief for the Government and I. C. C., 234 U. S. 549	12, 16
Frost Trucking Co. v. Railroad Commission, 271 U. S. 583	26
Hepburn Amendment, as enacted in 1906	14
Interstate Commerce Commission v. Clayton, 127 F. (2d) 967	24, 29
Interstate Commerce Commission v. Tank Car Oil Corporation, (No. Dist. Ga.), not yet reported—Exhibit "E" to petition for rehearing, Orig. Rec., pp. 291-303	29
Pennsylvania Ry. Co. v. Public Utilities Commission, 298 U. S. 170	19, 22, 23, 24
Pipe Line Cases, 234 U. S. 548	6, 7, 10
Prairie Oil & Gas Co. v. United States, 204 Fed. 798, 804-806	11
Smith v. Cahoon, Sheriff, 283 U. S. 553, 562-563	26
Valvoline Oil Co. v. U. S., 308 U. S. 141	6, 7, 13, 16, 20

IN THE SUPREME COURT OF THE UNITED STATES.

October Term 1944.

No. .....

CHAMPLIN REFINING COMPANY, A CORPORATION,
Appellant,
vs.
UNITED STATES OF AMERICA, AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

BRIEF OPPOSING MOTION TO AFFIRM.

Statement.

The appellant, in conformity with the provisions of subdivisions 3 and 4 of Rule 7 of this Court, submits this brief in opposition to appellees' motion to affirm.

The question involved is substantial and represents an invasion of a field of proposed regulation not heretofore assumed by the Interstate Commerce Commission.

The question presented, is whether a refiner of crude oil products may, without invoking the exercise of eminent domain, but solely by the purchase of privately obtained right of way, construct over and across state lines, a welded, seamless, steel products pipe line, as a plant facility for the moving of such refiner's refinery products *only*, out of refinery operational tanks, into storage tanks distantly located in other states, for future sale by such re-

finer from such storage tanks *only*, without thereby dedicating such pipe line to the use of its competitors, as a common carrier engaged in interstate transportation within the jurisdiction of the Interstate Commerce Commission?

The decision appealed from makes every interstate oil pipe line, regardless of the purpose for which it is used, a "common carrier" within the meaning of the Act.

The facts as found by the Commission and approved by the trial court, are not materially in dispute, save in respect to the finding (Rec., pp. 310-311) that the,

> "differential is adjusted so that the through charge to the final transportation destination of the product will equal the cost of product at the refinery plus the through transportation cost from the refinery by rail, or other means, to final destination."

This finding is but partially supported in the record and in any event, whether correctly made or otherwise, is not controlling in the result. The appellant, by reference, adopts its jurisdictional statement (Orig. Rec., pp. 340-348W) as a part of this brief for the recitation of the detail therein set forth.

In support of its contention that the question is *substantial*, the appellant directs attention,

First, to the fact that the Interstate Commerce Commission, on the 17th day of March, 1941, recognized that its proposed regulation of private products pipe lines in use in marketing refiner products, by valuation thereof as common carriers, represented an assumption of power which it had never exercised or claimed prior thereto. It also concluded that it should have legal authority for so doing and as a result, there was published a memorandum, copy of which was introduced in evidence in the trial of this case as Exhibit 50 (Orig. Rec., p. 1061) which reads as follows:

"Ex. 50.

Valuation 1980.

"At a Session of the Interstate Commerce Commission, Division 2, held at its office in Washington, D. C., on the 17th day of March, A. D. 1941.

Clyde B. Aitchison,
Walter M. W. Splawn,
J. Haden Alldredge,
Commissioners.

Recommendation made by Director Lewis in memorandum of Feb. 7, 1941, to Commissioner Miller, that the bureau of valuation proceed against either the Champlin Refining Company or the Standard Oil Company of Indiana in such manner as will bring before the Commission the question of jurisdiction under Section 19a for the purposes of a test case, approved, Commissioner Splawn voting in the negative."

Commissioner Splawn voted in the negative upon the declaration of intention indicated by such action, and this litigation has been continuously before the Commission and in the courts since that date.

This appellant, selected for a test case, is a New Mexico corporation, *entirely* owned by the family of the late H. H. Champlin, and has, as found by the Commission, but 3½% of the business in the area served by the pipe line (49 Val. Rep., p. 464).

Second, to the further fact that the first adverse report was published by the Commission on December 14, 1942 (49 Val. Rep. 463, Orig. Rec., pp. 1062-1069, inc.), upon which a reargument and reconsideration was granted on April 5, 1943 (Orig. Rec., p. 1070). Thereafter, a second report was published on June 12, 1944, 49 Val. Rep., p. 542 (Orig. Rec., pp. 1071-1079, inc.), Chairman Patterson and Commissioner Porter dissenting to the publication thereof.

Third, that the far-reaching decision of the 3-judge court was entered upon a majority opinion by Judges Murrah and Chandler, with Judge Vaught dissenting.

The opinions are attached to the jurisdictional statement submitted herewith and will be noticed in the argument, *infra.*

Fourth, that during the argument upon petition for rehearing, Judge Murrah (Circuit Judge) whose vote decided the lawsuit, made certain statements (Orig. Rec., pp. 504-506, inc.), which we quote:

> "(During the presentation and argument on the motion for rehearing in the foregoing cause, the following proceedings, among others, took place.)
>
> Mr. Moody: * * * Your Honors, whether you say as to present conduct or as to the future, it ultimately comes to the same point, the same end, it takes property, and it takes it without due process of law. It takes it without any sort of process of law.
>
> Murrah, J.: Let's go back. I certainly want to say so far as I am concerned that as far as the interpretation or construction of the statutory language is concerned, I have no difficulty in finding that Congress intended to make the Champlin Pipe Line Company a common carrier within the meaning of this statute. I agree with you that the Supreme Court has not gone that far. There isn't any question about it as far as I am concerned. They have refused to go that far. I will put it that way. I say they have refused to do so. I don't know. I can't tell from reading those decisions whether they thought Congress could not do it or Congress did not intend to do it, but I am perfectly willing for them to clear it up, but it does worry me, the question of whether or not we are giving an unconstitutional construction to that. We are not unmindful of the force of our decision. I am not, and I am sure my associates are not. I am pretty sure Judge Vaught isn't, and Judge Chandler and I discussed it in detail. If the In-

terstate Commerce Commission said to you, 'Mr. Moody, you cannot transport your merchandise from Texas to Oklahoma unless you offer to transport all other merchandise, the merchandise of your neighbors and competitor,' I agree with you. I don't think they could do that. That is the *Clayton* case. 'You just can't force me to engage in a business I am not disposed to engage in.' That is, not under due process. That is involuntary servitude as far as that is concerned. But say the Texas-Empire Pipe Line Company starts down here and goes to some place in Illinois, and transports all kinds of gasoline for hire, all of those matters become correlated to a public interest. That is the point I have in mind.

Mr. Moody: All right, your first point, that the Supreme Court has refused to go as far as this Court has gone.

Murrah, J.: I don't think they have gone that far."

It is obvious that the concession, that the Supreme Court has "not gone as far" in the *Pipe Line* and *Valvoline* cases, as Judge Murrah admitted he was going in this decision, completely negatives the appellees' contention that the "question here is not substantial."

The admitted refusal of a majority of a 3-judge specially constituted district court to follow the decisions of this Court, and especially landmark decisions, seems to counsel for appellant to present quite a *substantial* question within itself.

The motion to affirm is wholly without merit and upon the face of the record should be summarily denied.

ARGUMENT.

The appellant, in support of its objections to the appellees' motion to confirm, respectfully submits the following Points of Error and supporting argument. For avoidance in repeated identification in detail, the *Pipe Line Cases*, 234 U. S. 548, will be referred to as the *Pipe Line Cases;* the *Valvoline Oil Co.* v. *United States*, 308 U. S. 141, will be referred to as the *Valvoline Case;* the *majority opinion* in the trial court as the *majority;* and this Court will be referred to as the *Supreme Court.*

Point of Error I.

The majority erred in denying appellant relief and in holding that its petition should be dismissed.

Point of Error II.

The majority erred in construing Section 1 of the Interstate Commerce Act to include in its term "all pipe lines without regard to whether they were (are) private lines, or carried (carry) for the public," and to "apply to all engaged in interstate transportation of oil * * * by pipe line."

Point of Error III.

The majority erred in holding that in the operation of its products pipe line, appellant is a "statutory common carrier" under the terms of Section 1 of the Interstate Commerce Act.

Point of Error IV.

The majority erred in holding that since appellant is engaged in transporting oil products for the purpose of

later marketing them, "it is engaged in transportation in commerce within the meaning of the Act."

POINT OF ERROR V.

The majority erred in holding that appellant, in the operation of its products pipe line, is a "'future' pipe line company."

POINT OF ERROR VI.

The majority erred in holding, on the basis of the holdings challenged in Points of Error II to V, that appellant's operation of its products pipe line is subject to the jurisdiction of the Interstate Commerce Commission under the terms of the Interstate Commerce Act.

POINT OF ERROR VII.

The majority erred in holding that the "differential" is a transportation charge.

Statement.

Points of Error II to VII, inclusive, challenge the subsidiary holdings upon which the majority made the ultimate holding, attacked by Point of Error I, that appellant should be denied relief and its petition dismissed. Points of Error II to VI, inclusive, relate to the majority's interpretation of the Interstate Commerce Act and its application to the facts of this case. The construction which the majority has given to the Act and the application which has been made of it to the facts of this case, appellant respectfully contends, amounts to a refusal to follow the holdings of the Supreme Court in the *Pipe Line Cases*, 234 U. S. 548, and in the *Valvoline Case*, 308 U. S. 141. Points of Error II to VI, inclusive, being related to and involving the same general subject, will be presented under one argument. If any of them

are sustained, the force of Point of Error I will have been demonstrated.

Argument in Support of Points of Error II to VI, Inclusive.

The holdings upon which the majority have concluded that appellant's pipe line operations are within the terms of the Interstate Commerce Act are, under the facts of the case, in direct conflict with the holdings of the Supreme Court in the *Pipe Line Cases* and in the *Valvoline Case*. This seems too clear for haggling or dispute. The truth of the statement is demonstrable, and will be demonstrated, by a comparison of the herein challenged holdings with the records and holdings in the *Pipe Line Cases* and the *Valvoline Case*.

The construction which the Supreme Court placed on the pipe line clause of the Interstate Commerce Act in the *Pipe Line Cases* and in the *Valvoline Case*, together with the holding in the *Valvoline Case* that the change in language in the Act of 1920 did not change the meaning of the law as enacted in 1906, were binding on the trial court because of the final authority of the Supreme Court and on the principle of *stare decisis*. To say that the majority opinion in this case overrules the Supreme Court would be to state a legal impossibility, but to say that the majority has failed in this case to follow the Supreme Court would be to state an obvious fact. The majority opinion ascribes to the Act of 1920 a purpose wholly inconsistent with the holding of the Supreme Court in the *Valvoline Case, viz.*, that it did not change the meaning of the former Act. By no process of r a t i o n a l reasoning can any other conclusion be reached.

It will be shown that the Supreme Court has twice been pressed by the Government and the Interstate Commerce Commission to construe the pipe line clause of the Inter-

state Commerce Act as including all engaged in interstate transportation of oil by pipe line, as the majority has construed it in this case, and that the Supreme Court has twice refused to so construe it.

The holdings of the majority, that Section 1 of the Interstate Commerce Act applies to all engaged in interstate transportation of oil by pipe line, and that appellant is a "statutory" common carrier.

In the *Pipe Line Cases*, the Hepburn Amendment (Act of 1906) was construed to apply only to those pipe lines engaged in transporting oil in interstate commerce as carriers of oil for others—common carriers. The Supreme Court refused to distinguish between those which were common carriers in substance and form, and those which were common carriers in substance but not in outward form. Those which carried "everybody's" oil—nearly all of the oil east of California—were held to be common carriers in substance and in fact, if not in form. The pipe line which was used only to carry the oil of its owner to the refinery to be *refined* and the *products marketed*, the Uncle Sam Oil Company pipe line, was held not to be a common carrier pipe line in either fact, form or substance, and the operation of that line, therefore, was held not to be included in the Act.

Where a monopoly of the means of transportation was used to force producers of the oil to sell their oil to the pipe line owner before it would be taken into the pipe line, the Supreme Court refused to allow the fact of the transfer of title to obscure the very obvious fact that the pipe line was in truth serving the public as the only practical means of transporting oil. There, as in the *Valvoline Case*, it was the purchase from many and subsequent transportation that determined the applicability of the Act to such pipe line operators.

The opinion in the *Pipe Line Cases* must be looked to for its substance and overall effect in construing the statute; and, when so examined, it is apparent that the statute was there construed to reach only those pipe lines which transport for others, or furnish a means of transportation for the products of others, and as not reaching those pipe lines which were used to transport only the oil of the owner of the pipe line.

One sentence from Mr. Justice Holmes' opinion is quoted in the majority opinion, as follows:

> "The provisions of the Act are to apply to any person engaged in the transportation of oil by means of pipe lines."

The majority opinion then adds:

> "Congress intended to include all pipe lines without regard to whether they were private lines or carried for the public."

It is a dangerous business, thus, to attempt to dissect Mr. Justice Holmes' opinion into individual sentences that make up the whole, if one wishes to reach his true meaning. He used that one sentence, but that is not what he held. It might as well be argued that by that sentence he meant that the Act applied to *intrastate* movement of oil by pipe line because he did not in the sentence limit his statement to interstate movements, as to give the sentence the meaning given to it in the majority opinion in this case. When the Supreme Court held that the Uncle Sam Oil Company was not under the Act, it construed the provisions of that Act to *not* apply to "all engaged in interstate transportation of oil by pipe line." That is a Supreme Court holding which the majority of the trial court has failed to follow, and upon the basis of one sentence has attempted to ground a holding contrary to the holding of the opinion from which that sentence is taken.

The holding of the majority in this case that all pipe lines engaged in moving oil from one state to another, whether or not the operations are private or for the public, are by the terms of the Act made common carriers, and the holding of the Supreme Court in the *Pipe Line Cases* that not all such pipe lines are under the Act, cannot stand at one and the same time, if the Act of 1920 did not change the meaning of the Act of 1906 as contended by the Government and held by the Supreme Court in the *Valvoline Case*. One holding must yield to the other; one must fall, and the other stand.

The Act of 1906 had never been construed by any court to reach all pipe lines engaged in moving oil from one state to another, except the Commerce Court (*Prairie Oil & Gas Co.* v. *United States*, 204 Fed. 798, 804-806), until the majority opinion was published in this case. The Commerce Court's construction was overruled by the Supreme Court when that case reached the Supreme Court in the *Pipe Line Cases*, and the Supreme Court held that the operations of the Uncle Sam Oil Company were not within reach of the Act. The Uncle Sam Oil Company was using its pipe line to move from one state to another only its own oil. The Commerce Court held it and all other companies involved in the case were under the Act. The Supreme Court held that the operations of the Uncle Sam Oil Company were not within the reach of the Act. This holding was not based upon a ruling on any constitutional question, but on the terms of the statute and the private nature of the Uncle Sam Oil Company's operations.

In the *Pipe Line Cases* the Government and the Interstate Commerce Commission had pressed upon the Supreme Court the theory that: "Congress intended the Act to apply to every interstate oil-carrying pipe line, and to compel every such interstate pipe line to become a common carrier as a condition precedent to engaging in interstate

commerce." (See summary of brief for the Government and Interstate Commerce Commission, 234 U. S. 549). The Supreme Court refused to adopt the construction contended for by the Government and Interstate Commerce Commission when the Supreme Court held that the Act did not apply to the operations of the Uncle Sam Oil Company; but the majority in this case has held that the Act of 1920, amending the Act of 1906, without change of meaning, does apply to all engaged in interstate transportation of oil by pipe line.

If the Supreme Court's construction of the Act is to stand, then, appellant being in this case in the same fact situation from a legal standpoint, as the Uncle Sam Oil Company was in the *Pipe Line Cases*, the holding of the majority of the trial court that appellant's petition should be dismissed, is clearly error, unless the Act of 1920 has a meaning different from the Act of 1906, which was before the Supreme Court in the *Pipe Line Cases*.

The Act of 1920 had never been construed by any court to reach all pipe lines "without regard to whether they were (are) private lines or carried (carry) for the public," or to apply "to all engaged in interstate transportation of oil * * * by pipe line," until the majority opinion in this case gave it such far-reaching effect. The Act of 1920 has been before the Supreme Court in only the *Valvoline Case*, and in that case the Supreme Court failed to give it such a construction although the Government advanced the theory, as will be shown herein, that the Act of 1920 applied to all engaged in interstate transportation of oil by pipe line.

Four features of the opinion in the *Valvoline Case* are of especial interest in this case. They are: *first*, that the change in wording between the Act of 1920 and the Act of 1906 did not effect a change in the meaning of the law; *second*, the approval of the holding in the *Pipe Line Cases* that the operations of Uncle Sam Oil Company were not

within the Act; *third*, the basis of the holding that *Valvoline's* operations were within the reach of the Act; and, *fourth*, the fact that the Supreme Court failed to hold that Valvoline was a "future" pipe line (as the majority of the trial court has held appellant to be a "future" pipe line), and on that basis hold that Valvoline was under the Act.

The Act of 1920 provides that it shall "apply to common carriers engaged in * * * the transportation of oil * * * by pipe line, and that the term 'common carrier' includes 'all pipe line companies'. * * * and all persons, natural and artificial, engaged in such transportation * * * as aforesaid as common carriers for hire." What does this language mean? The Government contended in the *Valvoline Case* that the language did not change the meaning of the Hepburn Act as it was enacted in 1906, stating at page 13 of the Government's brief in the *Valvoline Case*, (see Exhibit "F" to petition for rehearing, original record, pp. 146-166) that,

> "* * * While the applicable sections of the Act have been amended in minor detail since that decision [the decision in the *Pipe Line Cases*], the amendment simply clarifies the language of the statute and does not make any important change in policy."

See, page 21 also of same brief.

In the *Valvoline Case*, the Supreme Court said that the difference in wording between the Act of 1906 and the Act of 1920 did not effect a change in meaning. On this point it was said: "In the present Act there is a change of language but we perceive none in meaning," and quoted from the report of the Committee of Congress stating that the Act "amends * * * the Commerce Act, making minor corrections and classifying language in several respects, but making no important changes in policy."

Mr. Justice Reed and the Government were then in accord on the point that the meaning of the Act of 1906 and

the Act of 1920 are the same, for he said that the change in language between the Act of 1906 and the Amendment of 1920, did not effect a change in meaning; and, moreover, to fortify his holding, he quoted the Congressional Committee's statement that the Amendment of 1920 was not intended to change the policy declared in the earlier statute.

The Hepburn Amendment, as enacted in 1906, provided that,

> "The provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil * * * by means of pipe lines * * * who shall be considered and held to be common carriers within the meaning and purpose of this Act * * *."

Mr. Justice Holmes held in the *Pipe Line Cases* that the last quoted language reached those that were common carriers in form and substance, and those that were common carriers in substance, though not in form; but, in effect, held that a pipe line used only to carry the pipe line owner's oil was not within the reach of the Act.

Mr. Justice Reed in the *Valvoline Case* approved this holding, stating that the Uncle Sam Oil Company's pipe line was used for the "'sole purpose of conducting oil from its own oil wells to its own refinery'," and added that, as to the Valvoline's operations, "it is the purchase from many sources and subsequent carriage that determine the applicability of the statute to Valvoline."

The fact that a means was provided to others of transporting their products—transportation for others—was the basis upon which all pipe lines involved in the *Pipe Line Cases*, except the Uncle Sam Oil Company's line, and the lines later involved in the *Valvoline Case*, were held to be within the terms of the pipe line clause of the Interstate Commerce Act. Use of a monopoly of the only available, practical means of transportation to force a sale of the oil to the pipe line owners, as a condition upon which it would

be transported, was not allowed to conceal the fact that the transportation was, in reality and in truth, for others. At the same time it was recognized in both the *Pipe Line Cases* and the *Valvoline Case* that transportation of oil belonging only to the owner of the pipe line was not within the Act.

In the *Valvoline Case* the Supreme Court did not hold that the Act of 1920 applied to "all engaged in interstate transportation of oil * * * by pipe line," or included "all pipe lines without regard to whether they were (are) private lines or carried (carry) for the public," as the majority has held in this case. On the contrary, the Supreme Court, having held that the Act of 1920 did not change the meaning of the Hepburn Amendment or the policy declared therein, approved the holding in the *Pipe Line Cases* in respect to the operations of Uncle Sam Oil Company and said that "it is the purchase from many sources and the subsequent carriage that determine the applicability of the statute to Valvoline." Thus the Supreme Court refused to construe the Act of 1920 as the trial court has construed it, and held that Valvoline was under the Act for the very same reasons that the Supreme Court held in the *Pipe Line Cases* that the Standard Company was under the Act. The same facts that formed the basis for holding in the *Pipe Line Cases* that the operations of the Standard Company were within the terms of the Act of 1906 also formed the basis for holding in the *Valvoline Case* that the operations of Valvoline were within the terms of the Act of 1920. The same rule was applied in both cases under Acts of equal meaning. This application of the same rule in both cases, together with the approval in the *Valvoline Case* of the holding as to the operations of the Uncle Sam Oil Company and the statement that the change in language between the two Acts did not effect a change in meaning, makes clear that the Su-

preme Court has declined to give the Act of 1920 the construction which the majority has given to it in this case.

It is stated above that the Supreme Court has twice refused to give the pipe line clause of the Interstate Commerce Act the construction which the majority has given it in this case. The facts justify the statement.

In the *Valvoline Case* the theory was advanced, as it had been as to the Act of 1906 in the *Pipe Line Cases* and as it has been as to the Act of 1920 in this case, that the Act of 1920 brought within its reach all persons engaged in the interstate transportation of oil by pipe line, for it was stated at page 13 of the brief for the Government and the Interstate Commerce Commission identified, *supra*, in that case that,

> "* * * Since Valvoline is a pipe line company, engaged in the interstate transportation of oil, it comes directly within the statutory definition."

In other words, said the Government and the Commission in that case, any person engaged in interstate transportation of oil by pipe line is within the terms of the Act.

Again, at page 21 of the same brief for the Government and the Interstate Commerce Commission in the *Valvoline Case*, the following statement was made:

> "The fact that Valvoline is a pipe-line company is determinative of the fact that it is a common carrier within the meaning of the Act; Section 1(3) expressly directs that the term 'common carrier * * * shall include all pipe-line companies'."

The theory of the Government thus advanced that the Act of 1920 included within its terms all engaged in interstate transportation of oil by pipe line was not accepted by the Supreme Court, as is apparent from the opinion in the *Valvoline Case*. Therefore, the statement that the Supreme Court there refused to construe the statute as the majority

has construed it in this case is justified. Acceptance of that theory and the construction of the Act as there proposed would have provided an easy way out in the *Valvoline Case*. The Supreme Court did not adopt that means of disposing of the case, but held that Valvoline was brought under the Act by reason of "the purchase from many sources and subsequent carriage," and so applied to Valvoline the rule upon which the Standard Company's operations had been held subject to the Act in the *Pipe Line Cases*. Valvoline was not held subject to the Act solely by reason of the fact that it was engaged in interstate transportation of oil by pipe line.

Let it be remembered, as shown above, that in the *Pipe Line Cases* the Government and Interstate Commerce Commission contended that the Act of 1906 should be construed to bring within its terms all engaged in the interstate transportation of oil by pipe line. In that case such a construction would also have been an easy way out, but the Supreme Court refused to adopt it.

Thus it is shown that the Supreme Court has twice been pressed, and has twice refused, to construe the pipe line clause of the Interstate Commerce Act as the majority has construed it in this case.

At one point in the majority opinion the thought is advanced that a "change in verbiage was made for the purpose of making clear, if any doubt was created by the *Uncle Sam Oil Company* decision, that all future pipe lines engaged in the interstate transportation of oil * * * were covered by its terms." This statement cannot be reconciled with Mr. Justice Reed's holding in the *Valvoline Case* that, "in the present Act there is a change of language but we perceive none in meaning," or with his failure to base his holding on any such ground; but that statement of the majority opinion will be discussed under another heading.

The majority's holding that the Act applies to all persons engaged in interstate transportation of oil by pipe line must necessarily yield to the holdings of the Supreme Court in the *Pipe Line Cases* and the *Valvoline Case*, and with it must also fall the majority's holding that appellant is a "statutory common carrier."

The holding of the majority that since appellant is engaged in transporting oil products for the purpose of later marketing them, "it is engaged in transportation in commerce within the meaning of the Act."

The majority would have great difficulty in pointing to any language in the Interstate Commerce Act suggestive of a legislative intent to provide that a privately constructed, owned and operated pipe line, used only for the purpose of transporting the pipe line owner's petroleum products from its refinery in one state to markets in another state, shall, because such products are being transported to market, be classed as a common carrier under the Act and subjected to the duties and obligations imposed upon common carriers by the Act. There is an utter absence of any language which would suggest that Congress intended the purpose of the transportation to be the factor for determining what is public transportation reached and regulated by the Act and what is private transportation beyond the reach of the Act.

The fact that appellant's products are moved by pipe line to storage near market centers, is not controlling to distinguish appellant's fact situation from the fact situation occupied by the Uncle Sam Oil Company in the *Pipe Line Cases*, or to make such transportation of appellant's products interstate transportation in commerce within the reach of the Act. The Uncle Sam Oil Company was moving its oil to a refinery to be refined and the products sold. This statement of the purpose involved in the Uncle Sam Oil

Company operations is based on Chief Justice White's statement (234 U. S. 562), speaking of the Uncle Sam Oil Company's operation, that, "the product of course when reduced at the refinery passes into the markets of consumption." The pipe line movement there was, as here, a necessary operation between production and marketing to the consumer. The Standard Company operations involved in the *Pipe Line Cases* were movements of oil to market. But, it was not the fact that the movement of the oil was to market that determined that the Standard Company operations were subject to regulation under the Act any more than the fact that the Uncle Sam Oil Company was moving its oil for a like purpose determined that the Uncle Sam Company's operations were not subject to regulations under the Act. It was the fact of purchase by the Standard Company from many, and in effect the transporting of oil for others, that determined the applicability of the Act to the Standard Company. The fact that the Uncle Sam Oil Company transported only its own oil, determined that its operations were not under the Act. The fact that the Uncle Sam Oil Company operations involved in the *Pipe Line Cases* were a step toward the marketing of the products refined from the oil was not allowed to obscure the fact that the transportation was private, and, therefore, not within the terms of the Act. Here it can be said, to paraphrase Mr. Justice Cardozo's language in *Pennsylvania Ry. Co.* v. *Public Utilities Commission*, 298 U. S. 170, *infra*, not all commerce is transportation, and not all interstate transportation is commerce within the meaning of the Interstate Commerce Act.

Certainly, there is not such a difference between the movement of oil from field to refinery by means of private pipe line, as a step toward marketing the products, and the movement of products from the refinery to storage near market centers by means of private pipe line, as to justify the assumption that Congress did not intend to include the

first movement within the terms of the Interstate Commerce Act, but did intend to include the second movement.

Again, in the *Valvoline Case*, the oil was moved by pipe line from the wells to refinery for the purpose of being refined and products sold in the markets, but it was not the fact that the oil was en route to market that determined the applicability of the Act of 1920 to Valvoline's operations. The Supreme Court said, "It is the purchase from many sources and subsequent carriage that determines the applicability of the statute to Valvoline."

In the *Valvoline Case*, Mr. Justice Reed, after referring to the practice of forcing the owners to sell their oil before it would be taken into the pipe lines, said:

> "* * * *Whether the oil so owned and transported was ultimately used by the carrier in its own operations or sold to others, was in this connection immaterial.* Certainly one would find a public interest in the sole means of transporting this commodity from thousands of wells *for thousands of producers.*" (Emphasis supplied.)

Mr. Justice Reed there said, in effect, that in the *Pipe Line Cases* whether the oil was being transported for use by the carrier or *for sale to others was immaterial;* that it was the means of transportation "from thousands of wells for thousands of producers" which constituted the controlling fact. Then in his opinion in the *Valvoline Case*, he said that it was "the purchase from many sources and subsequent carriage that determined the applicability of the statute to Valvoline."

In neither case was the holding based on the fact that the oil was being moved to market. In each case the holding was based on the fact that a means of transportation was furnished to others than the pipe line owner. The fact that the transportation was a step in bringing the oil to

market, was not a factor in determining the applicability of the Act, while in this case the majority has held that the same transportation is determinative of the applicability of the Act to appellant.

The Act was not construed to "apply to all engaged in the interstate transportation of oil * * * by means of pipe line" as a basis of bringing the Standard Company and Valvoline under its terms. The fact that the oil was being moved to market was not in either case made a determining factor. So the Supreme Court had the opportunity, in the *Valvoline Case* and in the *Pipe Line Cases*, to make each of these holdings but did not make either of them. Logically, the Supreme Court could not, in the *Valvoline Case*, have made either of these holdings, for they would have been in conflict with, *(1)* the holding that the change in wording between the Act of 1906 and the Act of 1920 did not effect a change in meaning, and *(2)* the approval of the exception of the Uncle Sam Oil Company's operations.

The Act of 1920, like the Act of 1906, was directed at transportation for others, and not at private transportation or transportation to market as such.

In the first paragraph on page 7 of the majority opinion (original record, p. 136), the following statement is made:

> "In the *Valvoline Oil Company* case the Court held that the provision in the 1920 amendment that the Act applied to 'all pipe line companies' did not narrow the coverage of the Act. *We think this change in verbiage was made for the purpose of making it clear, if any doubt was created by the Uncle Sam Oil Company decision, that all future pipe lines engaged in the interstate transportation of oil or other commodities, except water and natural or artificial gas, were covered by its terms.*"

The first sentence is an erroneous statement, uninten-

tional of course, of the holding of the Supreme Court in the *Valvoline Case.* There, Mr. Justice Reed had reference to the language, "engaged * * * as common carriers for hire," and not to the clause, "all pipe line companies."

The second sentence of the above quoted paragraph from the majority opinion is also erroneous in the purpose which it ascribes to the Act of 1920, for it is in direct conflict with the holding in the *Valvoline Case* that the change in language between the Act of 1906 and the Act of 1920 did not change the meaning of the law.

In *Pennsylvania Ry. Co.* v. *Public Utilities Commission,* 298 U. S. 170, Mr. Justice Cardozo clearly defined the class of carriers that are brought within the reach of the Interstate Commerce Act, and there he also had opportunity to hold, if it had been the law, that transportation for market is a controlling factor in determining whether transportation between states by privately owned, used and operated means is within the reach of the Interstate Commerce Act.

In that case he said:

> "* * * The question is whether it is that particular form of interstate commerce which Congress has subjected to regulation in respect of rates by a federal commission. *The Interstate Commerce Act* (49 U. S. C., Sec. 1, et seq.) *is aimed at common carriers exclusively,* Sec. 1 (1) (3), *and not even at all these.*" (Emphasis supplied.)

In that case, the Supreme Court was passing upon whether or not transportation of coal from mines in Pennsylvania to a cleaning and sizing plant in Ohio by the producer of the coal by means of its own barges and railroad lines, used only for that purpose, could be tied on to transportation of the coal by common carrier, after cleaning and sizing, to markets in the latter state, and the entire movement treated as interstate transportation within the terms

of the Interstate Commerce Act. The fact analogy between that case and this case is at once apparent. This case involves the use of private means to transport oil from one state to storage near market centers in other states; that case involved the use of private means to transport coal from one state to a cleaning and sizing plant in another state, and later transportation of the coal by common carrier to markets in the latter state.

In that case Mr. Justice Cardozo said:

> "* * * The only transportation of this coal by a common carrier of merchandise either by railroad or by water was intrastate transportation in Ohio between Negley and Youngstown. The transportation between Pennsylvania and Ohio was by the owner, who was not a common carrier, but furnished implements of carriage for its own use exclusively. Appellants would have us hold that this interstate transportation by an owner who does not carry for anyone else will be tacked to the intrastate transportation by railroads who are in business as common carriers, and the movement thus consolidated brought within the statute. The statute and the decisions as we read them forbid this unifying process."

If the Act does not cover the movement of coal from one state to another (from mines to markets) by means owned and operated by the owners of the coal, and used exclusively for that purpose, it seems apparent that movement of oil products from one state to another (from refinery to storage and market) by means owned and operated by the owner of the oil products, and used exclusively for that purpose, is not covered by the Act. The fact that the transportation of the coal was a step in moving the coal to market, was not treated as of any significance.

An illustration used by Mr. Justice Cardozo in the *Pennsylvania Railroad Case* emphasizes the point that, the fact that the movement of products by private means from

one state to another is for the purpose of reaching markets, does not determine that the movement is within the terms of the Interstate Commerce Act. His illustration was:

> "* * * The situation laid before us would not be changed in its essentials if a cooperative association of farmers doing business in Pennsylvania close to the state line were to use a fleet of trucks belonging to the association or its members to carry milk or vegetables from Pennsylvania to a railroad station in Ohio. Even though this were done systematically and not casually or in sporadic instances, the ensuing transportation by rail, if kept within Ohio, would not be transportation between the states within the meaning of the Act of Congress. If the concept of transportation is in need of expansion, it is for the legislative department of the government to determine how great the change shall be."

FINALLY, the Circuit Court for this (10th) Circuit, Judge Murrah sitting, in *Interstate Commerce Commission* v. *Clayton*, 127 F. (2d) 967, was presented with a state of facts showing that Clayton purchased coal in one state, transported it by his privately owned truck over the public highways and marketed it in an adjoining state. The purpose of the transportation was to get the coal to a place where Clayton might market it. The question in the case was whether or not Clayton's operations were those of a common carrier subject to the terms of the Motor Carrier Act. In that case the court failed to find in the fact that the transportation was for the purpose of marketing the commodity transported, a basis for holding that the transportation was affected with a public interest and, therefore, by a common carrier under the Act.

The holding of the majority that appellant is a "'future' pipe line company."

The majority speak of appellant as a "'future' pipe line company," presumably meaning that it is a "'future'

pipe line company" in the sense that its pipe line was built and put in operation subsequent to the enactment of the Hepburn Amendment and the amendment thereto of 1920.

The statement raises two questions: *first*, what did Mr. Justice Holmes mean by the term "future pipe lines," as used in his opinion in the *Pipe Line Cases*?; and *second*, to what extent may Congress, under the Commerce Clause, impose upon such a *pipe line*, built and operated solely for the use of its owner in the movement of oil from one state to another, such duties, burdens and regulations as are imposed upon interstate common carriers by the Interstate Commerce Act?

Again, the opinion in the *Valvoline Case* furnishes a complete answer to the theory that the reference in Mr. Justice Holmes' opinion to "future pipe lines" should be treated as construing the pipe line clause of the Interstate Commerce Act as designed to make a public utility out of every interstate pipe line constructed subsequent to the Act of 1906. Valvoline extended its intrastate pipe line into West Virginia in 1913, and into Ohio in 1926—after the enactment of the Act of 1906. (Valvoline's Brief, page 4—Exhibit "G" to petition for rehearing, Orig. Rec., pp. 146-166, inc.) Valvoline's interstate pipe line was, therefore, a "future pipe line," as that term is applied in the majority opinion in this case.

If the Supreme Court, in the *Valvoline Case*, had interpreted the term "future pipe line" as the majority interpret it in this case, the Supreme Court would have readily disposed of the *Valvoline Case* by treating it as a "future pipe line," thereby eliminating any future reasoning. It did not do so.

The Supreme Court, having said that both Acts had the same meaning, recognized that the *Valvoline Case* had to be disposed of on the basis of the original rule of the

Pipe Line Cases, and not on the basis that Valvoline's line was a "future pipe line." It did dispose of Valvoline's contention on the rule applied in the *Pipe Line Cases*.

In considering the reference by Mr. Justice Holmes to future pipe lines, we are given the choice of treating it either as *dictum* or as applicable to the issue in the case. It requires no citation of authority to establish the principle that statements in a court's opinion should apply to the precise issue involved, rather than to matters not before the court, if such application can be reasonably made; and it is not only reasonable, but logical as well, to say that Mr. Justice Holmes' reference to "future pipe lines" meant pipe lines of the same nature as those involved in the case before him, that is, common "carriers in substance, if not in form."

The second question does not present difficulty when its ultimate meaning, as applied to the facts of this case, is stated. As applied to this case, the question means, May the Congress by legislative fiat (the Interstate Commerce Act) subject to public use a pipe line thereafter built for the exclusive use of the owner in moving his property from one state to another, where the pipe line is built without government aid or resort to any power of sovereignty such as that of eminent domain?

The question embodies the facts surrounding the building and operation of the appellant's pipe line, and states the issue raised by the holding in the majority opinion that appellant is a "future" pipe line company.

If the owner of private property has not by his voluntary act devoted it to the use of the public, Congress does not have the power to require him to devote it to such use. The authorities supporting this statement are numerous and well known, and it is not necessary to cite them at length. (*Frost Trucking Co.* v. *Railroad Commission*, 271 U. S. 583; *Smith* v. *Cahoon, Sheriff*, 283 U. S. 553, 562-563.)

An owner may devote his property to a public use by voluntarily offering its services to the public. Again, an owner of private property, by the acceptance of government aid or resort to the exercise of a power of sovereignty, such as the power of eminent domain, may subject his property to use by the public, particularly so where the aid is accepted or the power of eminent domain is exercised, upon the condition that the property shall be made available for public use. In each instance, it is the voluntary act of the owner, and it is only his voluntary act, that subjects his property to public use. It cannot be done under the Constitution by legislative fiat. Where the owner has so voluntarily devoted his property to a public use the operations of the property may be regulated by law. The Government may take private property for public use, but when that power is exercised, the owner must be paid for his property. The property may not be taken for public use without compensation.

It would not be asserted by any that Congress could require a ranchman, who builds a private telephone line from his ranch in one state, to his home in another state, to allow the use of his telephone line to all persons living between the ranch and the town; or that the farmers referred to in Mr. Justice Cardozo's illustration, *supra*, could be forced to make their trucks available to the general public. The reason that the trucks or telephone line could not by law be made available to the general public, is because such a requirement would be the taking of private property for a public use and subjecting the property of the owner to uses to which he had not devoted it.

In logic, there is no distinction between a person building his privately-owned pipe line from his well or refinery in one state, to his storage tanks in another state, to be used exclusively for transporting his own property, and a farmer using his truck to haul his products from farm to

market. Each is a private property, devoted to a private use and withheld from the public use. The fact that the public may have need for a product does not give the public a right to use the private means of transportation employed to get the product to market. If that were not true, all private property engaged in producing, manufacturing or in transporting products and commodities needed by the public, would be charged with a public interest, subject to use by the public at prices regulated by law.

It seems to be conceded by the majority opinion in this case that Congress cannot impose upon a pre-existing private carrier engaged in transporting property from one state to another, the burdens of a common carrier, and that if the Interstate Commerce Act were so construed, it would be unconstitutional. It is, however, inferable from the opinion that Congress may impose upon one who in the future may engage in the private transportation of his own property from one state to another, the duty to make available to the public his means of transportation. An attempt upon the part of Congress to exercise such power, would be just as obnoxious to the Fifth Amendment as an attempt by Congress to subject a pre-existing private property to a public use. Each would amount to the taking of private property without due process of law.

Argument in Support of Point of Error VII.

The holding of the majority that the "differential" is a charge for transportation.

The majority find that the differential is an amount "adjusted so that the through charge to the final transportation destination of the product will equal the cost of product at the refinery plus the through transportation cost from the refinery by rail or other means to final destination." (Orig. Rec., pp. 310-311.) This is incorrect. In all cases, the competitive price at purchaser's place of business deter-

mines the amount of the differential and in some instances it is the rail rate to the destination, less the cost to the purchaser of transportation from terminal to destination. When it is the latter, that is because the competitive price makes it so.

The fact that applying the differential to the price of the products f. o. b. the refinery at Enid, may result in a price at destination that yields a profit over and above the cost to appellant of producing the products, plus the cost of moving them by pipe line, does not, as a matter of law, convert the differential into a transportation charge to the purchaser as the majority has held. (*Interstate Commerce Commission* v. *Clayton*, (10th Circuit) 127 F. (2d) 967; *Interstate Commerce Commission* v. *Tank Car Oil Corp.* (Northern Dist., Ga.), ... Fed. ...., not yet reported—Exhibit "E" to petition for rehearing, Orig. Rec., pp. 291-303.)

The holding of the majority that the differential is a charge for transportation, denies to appellant its clear legal right to adopt any formula it may choose or find convenient to price its products to meet the price at which its competitors in the marketing area are selling like products. The holding further disregards the true purpose of the differential, as shown by the evidence, and arbitrarily ascribes to it a purpose to make a transportation charge.

If competitive conditions make it possible to sell the products at the storage tanks at the pipe line terminal above cost to appellant, the profit must be looked upon as the result of a business venture, just as the losses would be if competitive conditions forced a sale at below cost to appellant. If profits result from the sale, the formula by which appellant grades up its Enid price to equal the competitive price at the place of sale, is unimportant. The profit, if one accrues, cannot be treated as a charge for transportation any more than it can be treated as a charge for refining.

The "differential" is a device or formula for grading up the Enid price of the products to equal the competitive price at place of sale. The profits, if any accrue, are the results of a business venture, and cannot be said, as a matter of law, to be a charge to the purchaser for transportation.

For the reasons shown, it is submitted that the motion to affirm should be summarily denied.

Respectfully submitted,

HARRY O. GLASSER,
DAN MOODY,
Attorneys for Appellant.

Copies of this Brief have been mailed to Hugh B. Cox, Acting Solicitor General, Wendell Berge, Assistant Attorney General, Edward Dumbauld, Esq., Special Assistant to the Attorney General, Department of Justice, Washington 25, D. C.; Nelson Thomas, Esq., Attorney for the Interstate Commerce Commission, Washington 25, D. C.; and Charles E. Dierker, Esq., United States District Attorney, Oklahoma City, Oklahoma.